

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

Louis Flores,

Plaintiff,

V.

United States Department of Justice,

Defendant.

) ) ) ) ) ) ) ) ) )

Civil Action No. 15-CV-2627

(Azrack, J.)

(Mann, C.M.J.)

## DECLARATION OF DANIEL F. VAN HORN

I, Daniel F. Van Horn, hereby declare as follows:

1. I am the Chief of the Civil Division of the United States Attorney's Office for the District of Columbia ("USAO-DC"). I have held that position since 2012, and have been an Assistant United States Attorney in the District of Columbia since 1992. I have been a practicing attorney in public and private sector positions in the District of Columbia for more than 39 years in total.

2. The purpose of this declaration is to provide the Court with additional information regarding the Freedom of Information Act (“FOIA”) request dated April 30, 2013, from Plaintiff Louis Flores, FOIA Request No. 2015-02422, pursuant to the Court’s Order dated August 8, 2016, entered in the above-captioned action. This declaration supplements the Declaration of Karin Kelly dated September 30, 2015 (the “Kelly Declaration”).

3. In the August 8, 2016 Order, the Court stated that the declarations previously submitted by the defendant “do not make clear the nature of the information contained in the two databases of cases and investigations of the United States Attorney’s Office for the District of

Columbia (“USAO-DC”), which databases were searched in response to plaintiff’s FOIA request.” (Dkt. No. 37). The databases referenced in the Kelly Declaration and by the Court are the Replicated Criminal Information System (“RCIS”) and the Legal Information Network System (“LIONS”).

4. RCIS is an electronic case management system for criminal cases and matters involving the Superior Court of the District of Columbia, and is used to store Superior Court criminal case and arrest-related information. RCIS contains factual information for individual cases and matters such as the case docket number and filing date, the identities of defendants, victims, witnesses, presiding judges, and assigned USAO-DC staff, the case type and description, and court schedules and events pertinent to the case. Superior Court case data is transferred daily to the USAO-DC through RCIS. RCIS is used primarily by the USAO-DC attorneys and staff in the USAO-DC Superior Court Division, which handles the prosecution of most local (non-Federal) crimes occurring within the District of Columbia.

5. LIONS is also an electronic case management system and is used to store factual information about criminal, civil, and appellate cases and matters other than those Superior Court criminal cases and matters for which information is maintained in RCIS. LIONS, like RCIS, contains factual information for individual cases and matters, including investigations, such as the case docket number and filing date, the identities of parties, affected agencies, victims, witnesses, presiding judges, and assigned USAO-DC staff, the case type and description, and court schedules and events pertinent to a case. LIONS is used primarily by the USAO-DC attorneys and staff in the USAO-DC Appellate, Civil, Criminal, and Special Proceedings Divisions.

6. When the USAO-DC opens a case or matter of any type, information about that case or matter should be input into RCIS or LIONS. Neither RCIS nor LIONS contains the underlying files for a case or matter, but they can be used to identify where those files may be located.

7. As stated in her declaration, Ms. Kelly, with the help of USAO-DC information technology specialists, conducted searches of RCIS and LIONS concerning the number of “activists” who had been “targeted for prosecution” in an effort to locate information responsive to plaintiff’s FOIA request, and those searches produced no results.

8. During the July 11, 2016 oral argument in the above-captioned case, plaintiff clarified that the records he is seeking through his FOIA request are guidelines, policies, procedures, protocols, or similar records concerning how the USAO-DC balances the First Amendment rights of activists when making charging decisions or undertaking prosecutions of activists arising from their participation in protests or demonstrations which involve acts of civil disobedience or violations of criminal laws. (*See, e.g.*, July 11, 2016 Transcript of Civil Cause for Oral Argument, Dkt. No. 35, at 20:12-16, 24:8-11).

9. In the August 8, 2016 Order, the Court encouraged the government “to conduct a further search of [RCIS and LIONS], using the term ‘demonstration’ and variants thereof.” (Dkt. No. 37). In accordance with the Court’s encouragement, USAO-DC information technology specialists have recently conducted another search of both RCIS and LIONS using the following terms: demonstration, demonstrations, protest, protests, rally, rallies, march, marches, picket, pickets, rebel, rebels, and mutiny. These further searches uncovered no guidelines, policies, procedures, and/or protocols concerning how the USAO-DC balances the First Amendment rights

of activists when making charging decisions or undertaking prosecutions of activists arising from their participation in protests or demonstrations which involve acts of civil disobedience or violations of criminal laws.

10. The failure to find any guidelines, policies, procedures, and/or protocols of the sort plaintiff seeks through a search of RCIS and LIONS is not surprising because RCIS and LIONS are not designed to be and are not used as repositories for policy documents. RCIS and LIONS are used to store and retrieve factual information about individual cases or matters, and to learn the status and track the progress of individual cases and matters. Although a search of RCIS and LIONS would identify specific cases that had been labeled or designated with the words “activists, demonstration, demonstrations, protest, protests, rally, rallies, march, marches, picket, pickets, rebel, rebels, or mutiny,” records about USAO-DC guidelines, policies, procedures, and protocols are not maintained or indexed in those databases.

11. In the August 8, 2016 Order, the Court also pointed out that the declarations previously filed by the government in this case did not “reference an alleged search that defendants subsequently conducted of the USAO-DC prosecution file regarding Lt. Daniel Choi and his co-defendants.” (Dkt. No. 37). Because Ms. Kelly is not currently employed at the USAO-DC and, other than what was provided in her Declaration, I could find no information concerning the search that she performed of the USAO-DC prosecution file regarding Lt. Daniel Choi and his co-defendants, I have no personal knowledge regarding any such search. Accordingly, I personally reviewed all six boxes of records which comprise that prosecution file, and found no guidelines, policies, procedures, and/or protocols concerning how the USAO-DC balances the First Amendment rights of activists when making charging decisions or undertaking prosecutions

of activists arising from their participation in protests or demonstrations which involve acts of civil disobedience or violations of criminal laws. I did, however, find in that file the attached letter dated July 19, 2013, from Principal Deputy Assistant Attorney General Peter J. Kadzik to Congressman Mark Pocan, in which Mr. Kadzik advised Congressman Pocan to “be assured that the Department of Justice is committed to protecting the civil rights of all Americans, including lesbian, gay, bi-sexual and transgendered individuals, and that the Department does not seek to prosecute any individuals for engaging in lawful protests.” The file also contained a fax copy of Congressman Pocan’s March 27, 2013, letter to Attorney General Eric Holder, to which Mr. Kadzik’s letter responded. A copy of that fax is also attached.

12. I also spoke to Assistant United States Attorney Angela George, who was the prosecutor in the case against Lt. Daniel Choi and his co-defendants, and asked her whether she was aware of any USAO-DC records, either in electronic or hard copy format, that contain any guidelines, policies, procedures, and/or protocols concerning how the USAO-DC balances the First Amendment rights of activists when making charging decisions or undertaking prosecutions of activists arising from their participation in protests or demonstrations which involve acts of civil disobedience or violations of criminal laws. AUSA George stated that she was not aware of any such records.

13. In addition to speaking to Ms. George, I spoke to the Chiefs of the USAO-DC’s Appellate Division, Criminal Division, Special Proceedings Division, and Superior Court Division, and asked each of them if she or he was aware of any USAO-DC records, either in electronic or hard copy format, that contain guidelines, policies, procedures, and/or protocols concerning how the USAO-DC balances the First Amendment rights of activists when making

charging decisions or undertaking prosecutions of activists arising from their participation in protests or demonstrations which involve acts of civil disobedience or violations of criminal laws. Those individuals, together with myself, comprise the senior leadership of the USAO-DC's litigating components, and each of them has years of experience working in the USAO-DC. If there are any USAO-DC records of guidelines, policies, procedures, and/or protocols concerning how the USAO-DC balances the First Amendment rights of activists when making charging decisions or undertaking prosecutions of activists arising from their participation in protests or demonstrations which involve acts of civil disobedience or violations of criminal laws, then one or more, if not all, of those individuals would know of such records. Each of those individuals told me that he or she was not aware of any such records.

14. Based on the foregoing, as well as my own experience working in the USAO-DC, I represent to the Court without reservation that there are no USAO-DC records, either in electronic or hard copy format, of guidelines, policies, procedures, and/or protocols concerning how the USAO-DC balances the First Amendment rights of activists when making charging decisions or undertaking prosecutions of activists arising from their participation in protests or demonstrations which involve acts of civil disobedience or violations of criminal laws. When First Amendment issues are presented in cases handled by the USAO-DC, those issues are addressed by applying applicable legal principals to the specific facts presented in the particular case or matter, not by application of a rigid, pre-determined policy.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 24, 2016.

A handwritten signature in black ink, appearing to read "Daniel F. Van Horn", written in a cursive style.

/s/ Daniel F. Van Horn  
DANIEL F. VAN HORN



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, DC 20530

JUL 19 2013

The Honorable Mark Pocan  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Congressman Pocan:

This responds to your letter dated March 27, 2013, to the Attorney General, requesting that the Department of Justice refrain from pursuing the prosecution of Daniel Choi in connection with his 2010 arrest during a protest in front of the White House.

As a matter of public record, on November 15, 2010, during a "Don't Ask, Don't Tell" (DADT) demonstration in front of the White House, Mr. Choi and 12 other protestors handcuffed themselves to the White House fence and failed to obey repeated warnings by the United States Park Police to leave the area. Mr. Choi and the other protestors were charged by criminal complaint with failure to obey a lawful order pursuant to 36 C.F.R. § 2.32(a)(2), a Class B misdemeanor. The 12 other protestors resolved their cases through a deferred sentencing agreement. As a condition of this agreement, their cases were dismissed. Mr. Choi rejected this offer, which would have resulted in dismissal of his case. After Mr. Choi rejected this offer, the United States Attorney's Office for the District of Columbia extended the option of a deferred prosecution agreement which also would have resulted in a dismissal of his case. Mr. Choi rejected this second offer and chose to proceed to trial. The trial began on August 29, 2011. During the trial, Mr. Choi attempted to raise selective/vindictive prosecution as a defense to the charge, and the district court rejected this claim. Mr. Choi appealed to the Court of Appeals for the D.C. Circuit, which dismissed the appeal for lack of jurisdiction.

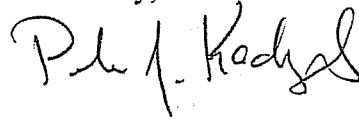
The trial resumed before Magistrate Judge John M. Facciola on March 28, 2013, at which time Mr. Choi was found guilty of the charge and fined \$100.00. On April 11, 2013, Mr. Choi filed a motion for judgment of acquittal and dismissal, which Judge Facciola denied. On June 14, 2013, Mr. Choi filed a motion to vacate the conviction and for a new trial based on ineffective assistance of counsel. This motion is still pending.

Please be assured that the Department of Justice is committed to protecting the civil rights of all Americans, including lesbian, gay, bi-sexual and transgender individuals, and that the Department does not seek to prosecute any individuals for engaging in lawful protests.

The Honorable Mark Pocan  
United States House of Representatives  
Page 2

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance in this or any other matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter J. Kadzik". The signature is fluid and cursive, with the first name "Peter" and last name "Kadzik" clearly distinguishable.

Peter J. Kadzik  
Principal Deputy Assistant Attorney General



2013/03/27

FROM: Leslie Zelenko

TO:

1 /3

Leslie Zelenko  
Legislative Correspondent  
Congressman Mark Pocan (WI-02)  
313 Cannon HOB | Washington, DC 20515  
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2013/03/27

FROM: Leslie Zelenko

TO:

2 /3

MARK FOCAN  
2013-03-27, 10:00 AM  
COMMITTEE ON OVERSIGHT  
AND GOVERNMENT REFORM  
COMMITTEE ON THE BUDGET  
ASSISTANT WHIP



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FEDERAL HOUSE

UNITED STATES  
HOUSE OF REPRESENTATIVES

March 27, 2013

Attorney General Eric Holder  
U.S. Department Of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-0001

Dear Attorney General Holder,

As the Supreme Court hears debates on the Defense of Marriage Act (DOMA), I am encouraged by the democratic process and hopeful that the Court will protect the rights of all Americans, and rule in favor of equality. I commend you for not defending this archaic law, and I believe that history will look favorably upon your actions.

Another law that continues to affect the LGBT community and has tainted our country's history and reputation was Don't Ask Don't Tell (DADT). It was a great day when this law was repealed, and as we begin a new chapter in our nation's history, it is exciting to see that our military is now at the forefront of granting rights to same-sex couples, setting an example for the rest of our government.

There are, however, lasting repercussions from the days when we did not recognize the rights of the LGBT community, and particularly, our LGBT service members. These members offered to give their lives for their country but were forced to conceal who they were from society. Those members who refused, identifying as gay, were discharged without full separation pay. More than 13,000 troops were discharged under this policy. The Department of Defense has agreed to reimburse many of those members and is making amends for the unfortunate DADT policy.

However, it has come to my attention that there are ongoing prosecutions of service members, such as Lieutenant Dan Choi, who protested this policy and are being prosecuted for the most serious of possible offenses. Like those in the civil rights movement before, the protesters' actions brought attention to the issues and were catalysts for change. Without service members, such as Lieutenant Choi, speaking out for change, this archaic, discriminatory, and demeaning policy might still exist. These protesters should not be punished for these actions; they should be commended for the courage it took to speak out and take a stand when the military culture discouraged this activity. Furthermore, prosecuting Lieutenant Choi and others prevents them from being eligible to reenlist in the military, as many of them wish to do.

Similar to how you did not defend DOMA, I ask you to consider not prosecuting cases related to these DADT protests. As this law has been repealed, I imagine that prosecuting relating cases is

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2013/03/27

FROM: Leslie Zelenko

TO:

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strategically ineffective and does not achieve any concrete goals. Given these hard economic times, we must be fiscally responsible, and the cost and personnel associated with prosecuting these cases is not the best use of government resources. We now have an opportunity to support civil rights movements, recognize the importance of protests and the fact that DADT was repealed, and protect equal rights for all. With Lieutenant Choi's trial scheduled for March 28, we have an opportunity to send a strong signal demonstrating that we have turned a corner on this issue. It is my hope that you will seize this momentous occasion by not pursuing these prosecutions.

Sincerely,



Mark Pocan  
Member of Congress

Initials/lz